No. 80-1731

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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1980

JOHN TARPEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

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This reply brief is respectfully submitted to bring to this Court's attention the factual misstatements and misleading arguments in the Government's brief.

A. The Probable Cause to Arrest Issue

Petitioner concedes that Agents Kuhn and Mika had probable cause to detain and arrest Karnefsky. After all, they had seen him load and unload cartons which they knew were part of the stolen shipment. As they were trailing Karnefsky down Pennsylvania Avenue there can be no question that the agents knew that the green van contained contraband.

Petitioner's existence was unknown to the agents until the encounter at the traffic light on Pennsylvania Avenue. Even assuming, *arguendo*, that petitioner's actions raised the interest of the trailing agents, which justified a *Terry v. Ohio* stop, the Government's argument that "from that point forward the quantum of 'cause' that *the agents possessed* multiplied" is factually and unsupported by the record.[1] (Emphasis added.)

Initially, it must be noted that the Government apparently agrees with petitioner that a key factual finding made by the Court of Appeals for the Second Circuit is erroneous. In finding probable cause for petitioner's arrest, the court below relied exclusively on what the agents saw as they trailed petitioner and Karnefsky and when the latter opened his van. The court below incorrectly found that when petitioner parked his vehicle at the curb and Karnefsky double parked near him, "both men left their vehicles."[2]

However, such a significant event did not happen as is apparently conceded on page three of the Government's brief. It is respectfully submitted that the above-described erroneous conclusion of the court below substantially weakens its finding of probable cause. In fact, the record clearly establishes that petitioner parked his vehicle legally and was walking on the sidewalk away from Karnefsky — without speaking to him — when Agent Mika "detained" or arrested him.

The Government's multiplication of the quantum of "cause" theory is pure speculation unsupported by the record. We realize that the Government must justify holding petitioner on the street

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1. Gov't Brief, p. 7.

2. Petitioner's Appendix, p. 3a.

from 4:15 p.m. until 7:15 p.m., however its feeble attempt to do so belies the credibility of its ultimate position on the "cause" issue.

The Government's position is:

1. Petitioner was properly detained on 57th Street for three hours "in order to determine whether the green van contained stolen property" (Gov't Br. p. 3).

Yet, even before stopping the van the agents knew Karnefsky was moving Maas Bros. stolen property in that van. They had not lost sight of him since he left the truck yard on Alabama Avenue after reloading.

Furthermore, Agent Kuhn, upon stopping Karnefsky, was shown the contents of his van and he immediately observed Maas Bros. cartons therein.

Clearly, the Government's contention on this point is unsupported by the record. What is significant, we submit, is the painfully obvious failure (both by the Government and the court below) to come to terms with the testimony of Agent Kuhn that *the several hours were spent trying to figure out what, if anything, petitioner would be charged with.* The Government's position (Br. p. 8, Fn. 7), that this critical testimony has little weight because it was elicited from a trained FBI Agent on *cross-examination,* is truly mystifying, yet revealing. If that is the best the Government can do, we submit its response should be deemed a concession on the probable cause issue.

2. Part of the multiplication of "cause" was the fact that petitioner was driving a vehicle registered to Malben Buchwald, who owned Tina's Stationery Store where arrests had been made earlier.

Yet, there is no proof in the record that prior to arresting petitioner (either at 4:15 p.m. or 7:15 p.m.) *the agents on 57th Street knew that Buchwald was connected with Tina's Stationery Store.*[3] *As the Government concedes, Buchwald was not even arrested until five days later* (Br. p. 2).

Thus, the "Buchwald factor" could not have been part of the alleged probable cause.

3. Karnefsky and petitioner gave conflicting versions of their relationship to each other (Gov't Br. p. 7). As stated in the petition herein, it is obvious that Karnefsky was transporting stolen property and that *he* lied about petitioner, while petitioner told the truth about knowing and travelling with Karnefsky. We are puzzled that there can exist a rule of law or evidence that allows an inference of culpability against the truthful person.

4. Kuhn learned, in a series of telephone calls to a supervisor, that petitioner had previously been convicted of conspiracy to possess stolen property (Gov't Br. p. 4).

There is no such testimony in the record.[4]

In summary, we respectfully submit that the factors which the Government contends *multiplied* to establish probable cause, were non-existent at the time in question and should be

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3. The Government refers to Buchwald's "apparent involvement." (Br. p. 8).

4. Query: Would this be a proper factor in making a determination of probable cause?

subtracted from any evaluation whether there existed probable cause for the detention/arrest of petitioner.[5]

B. Colgan's Entry into Petitioner's Vehicle

It is undisputed that petitioner's vehicle was legally parked and posed no hazard to the public.

The Government contends the following:

1. Petitioner "agreed" to allow the agents to move the vehicle to his friend Ralphie's nearby parking lot.[6]

Yet, Agent Mika testified that petitioner never asked him or any agent to move the vehicle.[7]

2. After petitioner "consented" to the agents moving the vehicle he turned over the keys to Agent Mika.[8]

Yet, the record establishes beyond peradventure that at 5:30 p.m., when petitioner was allowed to sit in his vehicle, he gave the keys to Agent Mika.

Thus, it is respectfully submitted, the Government's attempt to argue "consent" is clearly contradicted by the record. In fact,

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5. Petitioner contends that there was no probable cause to arrest. If he had not been arrested the agents would not have had access to his vehicle or to a notebook seized during a subsequent search of his person.

6. Gov't Brief, p. 5.

7. It is significant to note that Agent Kuhn swore under oath to the United States Magistrate who issued the search warrant, that "[petitioner] *asked* the agent to move the car to a nearby lot." (Emphasis added.)

8. At approximately 7:15 p.m.

neither the District Court nor the court below found that petitioner consented to the entry into his vehicle.

There is no dispute that petitioner was able to and did arrange for the care and security of the vehicle and its contents with individuals known to him at the scene.[9] No cogent reason has been offered by the Government why petitioner's wishes and plans were thwarted by Colgan. *Cady v. Dombrowski*, 413 U.S. 433 (1973); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

The Government now concedes that the critical facts justifying securing the vehicles in *Dombrowski* and *Opperman* are not present here.[10] In a weak attempt to support the "community caretaking function" it now argues that entry was justified because the vehicle belonged to Buchwald. While offering no legal authority for its position the Government apparently has overlooked the possibility that the documents which allegedly "floated" from secrecy under the seat also belonged to Buchwald.

The Government argues (Br. p. 10) that petitioner makes no claim that Colgan entered the vehicle as a pretext for searching it. Such argument is technically correct. However, in light of all the evidence, petitioner consistently has claimed that the documents, allegedly found in the vehicle, never were in the vehicle.[11]

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9. Colgan was present when petitioner arranged with his friend Ralphie to get the "car *and* the keys." Ralphie agreed to secure the car for the night (Gov't Br. p. 5). While the Government scoffs at the testimony of Lenny Insalaco and petitioner, regarding additional arrangements for the vehicle, it concedes that the District Court did not discredit their testimony (Gov't Br. p. 9).

10. Gov't Br. p. 11.

11. There was a prior relationship between petitioner and Colgan. Colgan,

(Cont'd)

(Cont'd)

the more experienced agent, was "called in to assist" the agents on the scene and wound up alone with petitioner's vehicle.

The proof at trial established that the agents assigned to investigate the interstate theft were in possession of 365 stolen cartons *prior* to encountering petitioner at approximately 4:00 p.m. May 17. From that point forward petitioner and his vehicle were under constant observation and control of the agents. The documents would have had to be in the vehicle at that point in time.

Expert testimony offered by petitioner, without rebuttal, established that the driver of the hijacked truck would only have four pieces of paper in his possession, namely, a bill of lading and a three page manifest listing the number of cartons being shipped. Other experts testified that the "shipping documents," namely, *invoices* and *packing slips* were sealed in each of the cartons or, sometimes, placed in cellophane envelopes which were attached to the outside of the cartons. While a cellophane bag was found at Tina's Stationery — where cartons of bathroom scales were seized — the testimony of five agents, as to their observations on *May 17*, leads to the conclusion that the shipping documents were enclosed in their respective cartons. Agents Coldonato and Conlin testified that they saw only *labels* on the cartons. Agent Cox testified that he saw no shipping documents affixed to any cartons — which were basically all closed, some with steel bands around them. Agent Mika recalled seeing mostly closed cartons with no shipping documents affixed. Agent Kuhn did not see any open cartons and none with shipping documents attached.

Photographs taken by the FBI the following day — May 18 — depicted most of the cartons closed.

It was the day thereafter — May 19 — that Agents Kuhn and Colgan "searched" petitioner's vehicle and "found" 265 shipping documents.

Query: Since petitioner was stopped at 4:00 p.m. May 17, and the cartons were primarily still closed on May 18, how could the predominantly enclosed shipping documents be "found" in petitioner's vehicle?

C. The Search Warrant

The Government is misinformed as to the chronology of events concerning the warrant and the search. It states (Br. p. 6) that the search of petitioner's vehicle was the "next day" after petitioner's arrest. This is inaccurate. Petitioner was stopped and arrested on May 17. He was brought before the Magistrate to fix bail almost 26 hours later on May 18. The warrant was obtained at that time. The following day — May 19 — the agents "searched" petitioner's vehicle.

The Government attempts to bolster the conclusion of the court below, that Agent Kuhn merely "did not catch" the inaccurate representations in his affidavit, by attributing the drafting of the affidavit to an Assistant United States Attorney (Br. p. 6). This contention is insulting and must be given short shrift. It is common experience that such affidavits are always drafted by assistants and then given to the agents to read, verify or correct.

The Government has the audacity to contend before this Court that Colgan had told Kuhn accurate facts but the totally false description of events in the affidavit was the fault of an anonymous Assistant United States Attorney (Br. p. 7). That's really grasping for straws! The Government totally ignores the fact that Kuhn participated in the drafting, read the affidavit after it was prepared and then swore to its accuracy before a United States Magistrate. He testified:

> "Q. You knew that was false when you swore to it before the Judge, isn't that a fact? A. I knew that was not true when I swore to the affidavit."

The Government also ignores that testimony. Yet, undaunted, it argues (Br. p. 12) that Kuhn "knew" the

documents slipped out from under the "drivers seat." First, Kuhn didn't know anything; he wasn't there. Second, Colgan testified that the documents appeared from under the "passenger seat."

Finally, the Government suggests forgiveness and understanding for Agent Kuhn regarding his sworn representations because "he did not appreciate, from his *hasty* reading of the affidavit" that it was false. (Emphasis added.) The Government, however, forgets that it was 6:00 p.m. on *May 18* — a full working day after Kuhn spoke with Colgan that morning — when Kuhn swore to the accuracy of the facts. There is nothing to substantiate placing the blame on an Assistant or that Kuhn did not have sufficient time to verify the affidavit he was to swear to.

In light of all the events in this case we feel secure in contending that an intentional falsehood was uttered. At the very least there was a reckless disregard for the truth. The warrant passed judicial muster without inquiry. Again, the true picture was substantially tainted. A careful Magistrate would certainly have inquired into the fortuitous circumstances Colgan relates. In any event, petitioner was entitled to have the Court consider an accurate set of facts rather than one which was totally distorted.

The Government again errs when it argues (Br. p. 12, Fn. 11) that petitioner did not call into question the truth of Colgan's testimony. The record reveals that his testimony was inaccurate when he said there was a car in front of him. Nothing in the agent's reports indicated that, as he was pulling out from the curb, a car came by causing application of the brakes. But, since the Government raises it, why would Colgan's application of the brakes at an extremely low speed — pulling away from a curb — cause the documents to appear anymore than

petitioner's application of the brakes when he initially parked the vehicle? No one saw petitioner stuffing the documents back under the seat. Furthermore, and finally, if petitioner knew that the documents which could (and did) convict him were in the vehicle why would he call attention to his legally parked vehicle by showing anxiety about it to the agents? Why would he want to draw a crowd of agents to it by asking to sit in it or secure it? Wouldn't he think the agents would check the vehicle first?

The Government's contentions do not stand up to the facts. For the reasons set forth herein, and in the petition — in chief, it is respectfully submitted that this petition for a writ of certiorari should be granted and the judgment below reviewed.

Respectfully submitted,

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